BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY FUHR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,114
STRONG JOINT VENTURE, LLC	)	
Respondent	)	
AND	)	
	)	
INSURANCE CARRIER UNKNOWN	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the June 25, 2008, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

This is a claim for a March 7, 2006, accident and the resulting injuries to claimant's left hand. In the June 25, 2008, Order, Judge Howard found claimant was an employee of the respondent and that his accident arose out of and in the course of his employment. The Judge also found respondent was uninsured but respondent failed to prove it was insolvent. Accordingly, the Judge ordered respondent to pay the costs of both the preliminary hearing transcript and *future* medical expense. The Judge specifically stated he was not issuing an order on past due medical expense at this time.

Respondent contends Judge Howard erred and the preliminary hearing Order should be reversed. Respondent first argues the record fails to establish that it had a sufficient payroll to bring it within the provisions of the Workers Compensation Act. Next, respondent argues claimant was working for it as an independent contractor. In the alternative, respondent argues that claimant was injured performing forbidden work and, therefore, he was not performing work in the scope and course of his employment. And finally, respondent argues it does not have the financial ability to pay claimant's benefits

and, therefore, the Workers Compensation Fund should be ordered to pay claimant's medical expenses.

Conversely, claimant contends his projected wages for 2006 alone would bring respondent within the provisions of the Workers Compensation Act. Claimant also contends he was an employee of respondent, which controlled and directed his work. In that vein claimant argues, in part:

> It is clear that in this instance Strong Joint Venture, LLC hired Mr. Fuhr to work at a specific location to perform tasks that were assigned to him in a woodworking shop. He was paid hourly and was to work specific hours for 40 hours per week. He was to report to that location where he was assigned tasks by Mr. Dean or Sergio. He did not provide tools or supplies and he did only that work which his employer directed him to do in a manner his employer directed him to do it.[1]

Next, claimant argues he was not performing forbidden work at the time of the accident as he was making a toe kick for a dresser, which was part of his assigned work. And, last but not least, claimant asserts it is only logical for the Workers Compensation Fund to provide the medical care awarded claimant as there is uncontradicted evidence that respondent is unable to pay for those benefits. In summary, claimant requests the Board to modify the preliminary hearing Order by requiring the Workers Compensation Fund to pay claimant's medical bills, including those previously incurred.

The Workers Compensation Fund (Fund) contends the Judge obviously found the uncontradicted testimony regarding respondent's limited assets not credible. Moreover, the Fund argues that allowing an employer to shift liability to the Fund by simply stating it is unable to pay an award of compensation is not within the intent of the Workers Compensation Act. Finally, the Fund argues that one of the owners of respondent has the funds available to loan respondent money to pay claimant's medical expenses and, therefore, the Fund should not be responsible in this instance. That argument is summarized, as follows:

> Mr. [Kelly E.] Smith is one of the principals in the LLC known as Strong Joint Venture. Mr. Smith has been loaning money to the LLC personally to meet its monetary obligations. Mr. Smith has the funds available to loan money to the LLC, and as such, has the funds available to pay the compensation due to the claimant on behalf of the LLC. In fact, Mr. Smith testified both at his deposition and at the preliminary hearing that he offered to pay the medical bills in exchange for complete resolution of the claim.

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[1] Claimant's Brief at 5 (filed Aug. 14, 2008).

> Clearly, Judge Howard felt that if the employer had the money to offer to pay the claim off in its entirety, then the employer had the money to pay the benefits awarded in the preliminary hearing. . . .[2]

Consequently, the Fund requests the Board to affirm the preliminary hearing Order.

The issues before the Board on this appeal are:

1. Is respondent subject to the provisions of the Workers Compensation Act?

2. Did claimant work for respondent as an employee or as an independent contractor?

3. Did claimant's accident arise out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds as follows:

There is no dispute claimant injured two fingers on his left hand on March 7, 2006, while operating a table saw. Depending upon who is correct, the accident occurred on claimant's second, third, or fourth day on the job. At the time of the accident, claimant was working on cabinets or dressers that respondent was building or finishing for a nursing home.

Following the accident, claimant went to the Shawnee Mission Medical Center where Dr. William O. Reed, Jr., stitched claimant's left ring finger, stitched the left middle finger, and also inserted a pin in that finger. To date claimant has incurred over $15,000 in medical bills, which have not been paid. And Dr. Reed has proposed additional surgery, which claimant argues he is unable to obtain due to his unpaid medical expenses.

Respondent, which is a limited liability company, is owned by Kelly E. Smith and claimant's father-in-law, Tom Dean. Mr. Smith, who handles the day-to-day business aspects of respondent, testified respondent was formed in either 2005 or 2006 to perform maintenance and construction on his real estate projects. According to Mr. Dean, respondent now purchases and rehabilitates property for leasing or selling.

[2] Fund's Brief at 3 (filed Aug. 18, 2008).

Tom Dean testified that in addition to respondent he also owned and did business as Midwest Industries, which leased the shop space from respondent where claimant was injured. Moreover, according to Mr. Dean, the table saw claimant was operating at the time of his accident was owned by Midwest Industries. Mr. Dean testified that neither Midwest Industries nor respondent had any employees.

Mr. Dean testified that he was paid $25 per hour, or $4,000 per month, for the work he performed for respondent. Moreover, he testified respondent's 2008 "[p]ayroll would reach [$]20,000 maybe monthly, and material could be the same."[3]

According to claimant, Mr. Dean hired him to work in respondent's shop 40 hours per week at $18 per hour, with his normal work hours being from 8 a.m. to 5 p.m. Claimant testified tax withholding was not discussed with him before the March 7, 2006, accident.

But according to Mr. Dean, all of the individuals working for respondent are independent contractors that are paid an hourly wage. And he also testified that claimant knew he was hired as a subcontractor.

Mr. Smith testified at the preliminary hearing that in March 2006 he believed there were four individuals performing maintenance work for respondent, with each working somewhere between 30 and 40 hours per week. In addition, in March 2006 Mr. Smith was trying to obtain an apartment complex project for respondent, which would have kept that many people busy for six to nine months. Mr. Smith did not understand that claimant would work a 40-hour week as "we rarely have anybody work a 40-hour week."[4]

During claimant's relatively short stint with respondent, one other individual, a person named Sergio, worked in the shop with claimant. Claimant testified either Sergio or Mr. Dean told him what to do when he arrived at the shop in the mornings. Moreover, he indicated respondent furnished all the tools and materials he needed to perform his job.

As indicated above, claimant's medical expense has exceeded $15,000 and remains unpaid. Claimant testified that while in the emergency room immediately following the accident Mr. Dean advised that he would take care of claimant's medical expense as it was from a work-related accident. But Mr. Dean denies accepting responsibility for claimant's medical bills as he only requested copies of the bills for the office. Claimant's parents, however, testified Mr. Dean advised he would be responsible for claimant's medical expenses.

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[3] P.H. at 46.

[4] *Id.* at 65.

According to Mr. Dean, respondent's principal asset is the property where claimant was injured. Respondent owns no vehicles or equipment. But it does have a bank account, which Mr. Dean estimated held $5,000. Mr. Dean did not feel respondent was in a financial position to pay claimant's outstanding medical bills or even half that amount for additional medical care.

Mr. Smith testified at the preliminary hearing that the mortgage on respondent's property is around $76,000 and that the only tenant in the building pays $750 per month rent. According to Mr. Smith, respondent does not generate enough revenue to pay all the costs associated with the property, which runs about $1,500 per month. Mr. Smith testified at the preliminary hearing that respondent had about $660 in the bank. Moreover, Mr. Smith testified respondent had only one project in the works, which was remodeling a residence, and that respondent owed him about $60,000 for advances he had made.

It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both that may occur without being determinative of the relationship.[5] Moreover, there is no absolute rule for making that determination.[6] The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. And the terminology used by the parties is not binding.[7]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. And it is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control which renders one an employee rather than an independent contractor.[8]

But in addition to the right to control and the right to discharge a worker, there are other commonly recognized factors that help determine the nature of a business relationship. For example, they are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right

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[5] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[6] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[7] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[8] *Wallis*, 236 Kan. at 102, 103.

to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.[9]

The Judge determined claimant worked for respondent as an employee. The undersigned agrees. First, the undersigned finds respondent controlled the work claimant performed and when he performed it. Claimant was not hired to perform a certain piece of work but, instead, was hired to perform the work respondent assigned. In addition, claimant was to work 40 hours per week and to be paid on an hourly basis. Claimant did not operate an independent business and did not employ assistants. Respondent furnished the materials claimant used in his work and provided the table saw that claimant was using when he was injured. Claimant did not control the progress of the work that was being performed and the parties expected claimant to work for respondent for an extended period. Moreover, the work claimant performed for respondent was a regular part of respondent's business.

The undersigned also finds that claimant's accident arose out of and in the course of his employment with respondent. The undersigned finds that claimant was assigned to build cabinets and operating the table saw was part and parcel of that work. Claimant's testimony is credible that he was not prohibited from using the saw that injured his fingers.

Finally, the undersigned finds that respondent is subject to the Workers Compensation Act. The evidence is compelling that claimant's wages alone would have exceeded $20,000 for the 2006 calendar year.[10]

Unfortunately, the fact that claimant has established he is entitled to receive workers compensation benefits for his March 7, 2006, accident may not immediately help claimant obtain the additional medical treatment that he now seeks. Despite uncontradicted, overwhelming evidence of respondent's inability to pay claimant's outstanding and future medical expenses, the Judge ordered respondent rather than the Workers Compensation Fund to provide claimant's medical treatment. And although the undersigned is convinced the Fund should provide claimant's medical treatment and pursue respondent for reimbursement, the Board lacks jurisdiction at this juncture of the claim to review the issue of Fund liability and make such an order.[11]

Based upon the above, the preliminary hearing Order should be affirmed.

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[9] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[10] See K.S.A. 44-505(a)(2).

[11] See K.S.A. 44-534a(a)(2).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the Board affirms the June 25, 2008, Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of September, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Jeffrey D. Slattery, Attorney for Respondent
Derek R. Chappell, Attorney for Fund
Steven J. Howard, Administrative Law Judge

[12] K.S.A. 44-534a.